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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. DAVID MICHAEL DAVID, Defendant and Appellant.	B200015 (Los Angeles County Super. Ct. No. SA052159)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert P. O'Neill, Judge. Affirmed in part, reversed in part.

Cannon & Harris and Donna L. Harris, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Keith H. Borjon and Laura J. Hartquist, Deputy Attorneys General, for Plaintiff and Respondent.

David Michael David appeals from his conviction of sex offenses against his son and daughter. He challenges the sufficiency of the evidence as to one count and claims sentencing error. We find substantial evidence to support the challenged conviction. We conclude the trial court was not required to order a report pursuant to Penal Code section 288.1[1] before finding appellant ineligible for probation. We find no violation of section 654 because there was substantial evidence that the offenses of which appellant was convicted and punished occurred on separate, divisible occasions. The trial court erred in imposing an enhancement under section 667.51 for four counts. Finally, we agree with respondent that the abstract of judgment must be corrected to accurately reflect the trial court's sentences on counts two and three.

FACTUAL AND PROCEDURAL SUMMARY

Since sentencing issues are the core of this appeal, we need not set out the sordid details of appellant's crimes against his children. As to the offense for which appellant claims there was insufficient evidence, we defer our summary of the facts to our discussion of that issue.

In 2002, appellant's son, J., told his mother that appellant had molested him the previous year when the children visited him in Venice, California. The mother then asked her daughter, R., if appellant had done anything to her. R. confirmed that she too had been molested by appellant while staying with him in Venice. Mother reported the offenses to the police in Oregon, where she and the children lived.

The Los Angeles District Attorney filed an amended information charging appellant with 11 counts of committing a lewd act upon a child (§ 288, subd. (a).) As to these counts, it was alleged that there were multiple victims (§ 667.61, subd. (b)); that appellant had a prior conviction for violating section 288, subdivision (a) (§§ 667.51, subd. (a), 667.6, subd. (a)); that appellant had substantial sexual contact with R. and J. (§ 1203.066, subd. (a)(8)); and that appellant had a prior conviction for section 288,

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[1] Statutory references are to the 2001 Penal Code.

subdivision (a), making him ineligible for probation (§ 1203.066, subd. (a)(5)). It also was alleged that appellant had failed to register as a sex offender as required by a previous sex offense conviction (§ 290, subd. (a)(1)(A)); that he had failed to update his registration annually (§ 290, subd. (a)(1)(D)), and had failed to file a change of address (§ 290, subd. (f)(1)). As to all counts, it was alleged that appellant had two prior felony convictions within the meaning of section 1203, subdivision (e)(4). On the prosecutor's motion, the charge that appellant had failed to update his registration and the enhancements alleged under section 667.6, subdivision (a) were stricken.

Appellant pled not guilty and waived his right to a jury trial. The trial court granted a defense motion to dismiss four counts of violating section 288, subdivision (a). Appellant was found guilty of seven counts of violating section 288, subdivision (a). While the trial court initially found appellant guilty of the remaining registration violations, it later vacated the guilty finding as to those counts and found appellant not guilty on each of them. The special allegations pursuant to section 667.51, subdivision (a) (prior § 288 conviction); section 667.61, subdivision (b) (multiple victims); and section 1203.066, subdivision (a)(5) and (8) (ineligibility for probation) were found true.

Appellant was sentenced to a total term of 32 years, plus 45 years to life: counts 1, 2, and 11—three consecutive terms of 15 years to life, plus an additional five years on each count (§ 667.51, subd. (a)), to run consecutive to the term on count 4; count 4—middle term of six years; counts 3, 5, and 6—two years (one-third the midterm) consecutive to count 4. One additional five-year enhancement on counts 3, 4, 5, and 6 was imposed under section 667.51, subdivision (a). Appellant was ordered to pay a restitution fine, a parole revocation fine, a penalty assessment, and a security fee. He was ordered to provide DNA samples and to register as a sex offender. Appellant filed a timely appeal.

DISCUSSION

I

Appellant challenges the sufficiency of the evidence to support his conviction on count 3, a violation of section 288, subdivision (a), on two grounds. First he contends the evidence was insufficient to establish that he acted with the specific intent to satisfy his sexual desires. Second, appellant contends the evidence was insufficient to establish the act was a separate unlawful act.

"'In reviewing a challenge to the sufficiency of the evidence, we . . . "examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence and to special circumstance allegations. [Citation.] "[I]f the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding." [Citation.] We do not reweigh evidence or reevaluate a witness's credibility. [Citation.]'" (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 200, quoting *People v. Guerra* (2006) 37 Cal.4th 1067, 1129.)

In 2001, when these crimes were committed, section 288, subdivision (a) required proof of specific lewd intent, providing: "'Any person who willfully and lewdly commits any lewd or lascivious act, . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, *with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child*, is guilty of a felony.' (Italics added.) A violation of this section requires proof of 'the *specific intent* of arousing, appealing to, or gratifying the lust of the child or the accused.' [Citation.]" (*People v. Warner* (2006) 39 Cal.4th 548, 556.)

"Whether a particular touching is 'lewd' and criminal under section 288 cannot be determined separate and apart from the actor's intent." (*People v. Martinez* (1995) 11 Cal.4th 434, 438 (*Martinez*).) This statute is violated "by 'any touching' of an underage child committed with the intent to sexually arouse either the defendant or the child." (*Id*. at p. 442.) The Supreme Court explained: "[T]he courts have long indicated that section 288 prohibits *all* forms of sexually motivated contact with an underage child. Indeed, the 'gist' of the offense has always been the defendant's intent to sexually exploit a child, not the nature of the offending act. [Citation.] '[T]he purpose of the perpetrator in touching the child is the controlling factor and each case is to be examined in the light of the intent with which the act was done. . . . If [the] intent of the act, *although it may have the outward appearance of innocence*, is to arouse . . . the lust, the passion or the sexual desire of the perpetrator [or the child,] it stands condemned by the statute . . . .' [Citation.]" (*Id*. at p. 444.)

The *Martinez* court provided guidance in reviewing the sufficiency of evidence: "'[T]he trier of fact looks to all the circumstances, including the charged act, to determine whether it was performed with the required specific intent.' [Citations.] Other relevant factors can include the defendant's extrajudicial statements [citation], other acts of lewd conduct admitted or charged in the case [citations], the relationship of the parties [citation], and any coercion, bribery, or deceit used to obtain the victim's cooperation or to avoid detection [citation]." (*Martinez*, *supra*, 11 Cal.4th at p. 445.)

In context, J.'s testimony provided sufficient evidence that appellant touched his buttocks with the requisite sexual intent. J. was asked:

"Q. Now, . . . on the nights that your father would have you put your mouth on his penis, you said those were the same nights that he would put his hand on your penis?" J. answered: "Yes."

A series of questions and answers followed immediately:

"Q. Did he put both hands or one hand on your penis, if you remember?

"A. I can't remember.

"Q. Did he touch—did your father touch you anywhere else on your body?

"A. Yes.

"Q. Where?

"A. My butt.

"Q. And what would he touch you with?

"A. His hands.

"Q. And when he touched your butt, . . . where on your butt would he touch you?

"A. The outside."

It is apparent that J. was testifying that appellant touched his buttocks during the molestation episodes. J.'s testimony that appellant forced him to perform oral copulation and that appellant performed the same act on J., together with appellant's touching of J.'s penis, was evidence from which the trier of fact could conclude that the touching of J.'s buttocks was also for the same specific sexual intent.

Appellant also argues that the evidence is insufficient to establish that he touched J.'s buttocks in a separate act. From this, we infer that appellant implies that the touching was accidental or incidental. As we have seen, J. was describing specific sexual acts performed by appellant when he testified that his butt was touched. He did not describe other possible incidental touching of his limbs or other body parts that may have occurred during the molestations. The evidence, while not extensive, was sufficient to support a finding that appellant's touching of J.'s buttocks was a separate act.

II

Appellant argues the trial court abused its discretion and violated his right to due process by sentencing him pursuant to section 667.61 without first following the procedures outlined in the 2001 version of section 1203.066, subdivision (c) which creates an exception to probation ineligibility. Respondent contends that the trial court had no obligation to appoint a psychiatrist or psychologist because it was not inclined to place appellant on probation.

"'The grant or denial of probation is within the trial court's discretion and the defendant bears a heavy burden when attempting to show an abuse of that discretion. [Citation.]' ([*People v. Aubrey* (1998) 65 Cal.App.4th 279, 282.]) 'In reviewing [a trial

court's determination whether to grant or deny probation,] it is not our function to substitute our judgment for that of the trial court. Our function is to determine whether the trial court's order granting [or denying] probation is arbitrary or capricious or exceeds the bounds of reason considering all the facts and circumstances.' [Citation.]" (*People v. Weaver* (2007) 149 Cal.App.4th 1301, 1311.)

A defendant is eligible for probation, in the discretion of the sentencing court, unless a statute provides otherwise. (*People v. Aubrey* (1998) 65 Cal.App.4th 279, 282.) The trial court found the allegation of substantial sexual conduct under section 1203.066, subdivision (a)(8) true, rendering appellant presumptively ineligible for probation. Under these circumstances, probation may be granted only if all the following criteria are met: (1) the defendant is the victim's natural parent; (2) a grant of probation is in the child's best interest; (3) rehabilitation of the defendant is feasible, the defendant is amenable to undergoing treatment, and will be placed in a recognized treatment program immediately after grant of probation; (4) the defendant is removed from the household of the victim until the court determines the victim's best interests would be served by his return; and (5) there is no threat of physical harm to the victim if probation is granted. (§ 1203.066, subd. (c)(1)-(5).)

Appellant argues the trial court erred by failing to order a psychological report under section 288.1 before denying probation. Section 288.1 provides the court may not grant probation to a person convicted of committing any lewd or lascivious act on a child "until the court obtains a report from a reputable psychiatrist, from a reputable psychologist . . . as to the mental condition of that person." In *People v. Thompson* (1989) 214 Cal.App.3d 1547, 1549, the Court of Appeal held that a section 288.1 report is not mandated in every lewd or lascivious act case. (*Ibid.*) The trial court must order a psychological report under section 288.1 only if it is inclined to grant probation. If the court is not inclined to grant probation, it has no duty to order a section 288.1 report. (*Ibid.*)

The *Thompson* court explained its reasoning: "The obvious intent of the Legislature in enacting this statute was to protect society by requiring a psychiatric or

psychological report insuring that defendant is a suitable candidate for probation. Where the court, as in this case, has no intention of granting probation, and the record supports such a denial of probation, a section 288.1 report is not mandated." (*People v. Thompson*, *supra*, 214 Cal.App.3d at p. 1549.)

Appellant attempts to distinguish *Thompson* on the ground that he was sentenced under the provisions of section 1203.066 rather than under section 1170.1 (multiple felony convictions) as was the defendant in *Thompson*. He cites language in section 1203.066, subdivision (c), which codifies the exception to probation ineligibility which we have discussed above. The language on which appellant relies appears after a list of factors which must be present to allow probation: "The court shall order the psychiatrist or psychologist *who is appointed pursuant to Section 288.1* to include a consideration of the factors specified in paragraphs (2), (3), and (4) in making his or her report to the court." (§ 1203.066, subd. (c)(5); italics added.)

"'Under settled canons of statutory construction, in construing a statute we ascertain the Legislature's intent in order to effectuate the law's purpose. [Citation.] We must look to the statute's words and give them their usual and ordinary meaning. [Citation.] The statute's plain meaning controls the court's interpretation unless its words are ambiguous.' [Citations.]" (*People v. Arias* (2008) 45 Cal.4th 169, 177.) The language of section 1203.066, subdivision (c) on which appellant relies expressly refers to a psychiatrist or psychologist appointed under section 288.1. The plain meaning of this language is to incorporate the provisions of section 288.1 into section 1203.066. Under *People v. Thompson*, *supra*, 214 Cal.App.3d 1547, a report under section 288.1 is not mandatory if the trial court is not inclined to grant probation.

Here, at sentencing, the trial court said: "[U]nder section 1203.066 (c) as it existed [in] 2001, there was the possibility that you could be granted probation if the court made certain findings under subsection (c) subsection (2) if the court found that a grant of probation to the defendant would be in the best interest of the children. There are other findings that the court could make in granting you probation but I don't find that

you are worthy of probation and that certainly probation would not be in the best interest of the children in this matter, so probation will be denied."

We follow the reasoning of the court in *People v. Thompson*, *supra*, 214 Cal.App.3d 1547 and conclude the trial court did not abuse its discretion when it denied probation without ordering a report under section 288.1.

III

Appellant next argues "[b]ecause the placement of appellant's hands in counts three, four and five was merely incidental to the single intent of obtaining sexual gratification during the acts of oral copulation in counts one, two and six, imposition of consecutive terms on counts three, four and five violated Penal Code section 654." Counts one, two and six alleged that appellant committed lewd acts against J. (§ 288, subd. (a).) Counts three, four and five also involve J. and allege additional violations of section 288, subdivision (a).

In closing, the prosecutor argued that J. had testified to acts of orally copulating his father, being orally copulated, appellant putting his hand on J.'s penis, and on J.'s butt. As to the oral copulation, she argued that J. had testified about the first and last occasions and multiple incidents in between. She continued: "As to putting his hand on his penis and his hand on his butt . . . [J.] indicates that it happened more than once, but can only really describe one incident, so in their totality, I actually have at least seven incidents, but for counts 1 through 6, I only need six such incidents."

At sentencing, appellant argued that J. testified only to one act with "sub-actions." The court responded that it had found appellant guilty of "having him, [J.], perform oral copulation upon you on two particular occasions, . . . you were convicted of putting your hand on [J.'s] penis for your sexual gratification. You on two separate occasions that I found, you were convicted of fondling his butt on another occasion, as he testified, and another occasion I found you guilty of putting your hands on his penis."

The court later explained the basis for each count. Count one was based on J.'s oral copulation of appellant. Count two was based on J.'s oral copulation of appellant which the court found "occurred on a separate occasion than those in count 1 and count

11 within the meaning of Penal Code section 667.61(d)." Count three was based on fondling J's posterior, which the court found to be a separate lewd act. Count four was based on appellant placing his hands on J.'s penis, which the court found to be a separate act of lewd sexual gratification upon appellant. Count five, a lewd act where appellant put his hands on J.'s penis, was found to be a separate crime. Count six, based on appellant's oral copulation of J., was also found to be a separate act.

J. testified that he orally copulated appellant three to four times a week for three to four weeks. He also testified that on the same nights, appellant would put his hand around J.'s penis. J. testified that appellant put his mouth on J.'s penis "a few times."

Section 654 prohibits multiple punishment for a single act.[2] "'The test for determining whether section 654 prohibits multiple punishment has long been established: "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If *all of the offenses were incident to one objective*, the defendant may be punished for any one of such offenses but not for more than one." [Citation.]'" (*People v. Davey* (2005) 133 Cal.App.4th 384, 393, quoting *People v. Britt* (2004) 32 Cal.4th 944, 951-952.)

In *People v. Scott* (1994) 9 Cal.4th 331 (*Scott*), the defendant was charged with 14 counts of lewd and lascivious conduct in violation of section 288, of which two were allegedly committed by force or fear. The jury found the defendant guilty as charged, except it found only one forcible lewd act was committed. (*Id.* at p. 339) The victim had testified about 10 separate occasions when sexual intercourse occurred. On two occasions, the sexual intercourse was accompanied by fondling of the victim's breasts and buttocks. On two other occasions, the defendant orally copulated the victim in addition to having intercourse with her. (*Id*. at pp. 337-338.) The Court of Appeal

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[2] Section 654, subdivision (a) provided: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, *but in no case shall the act or omission be punished under more than one provision*." (Italics added.)

reversed the conviction on the two fondling charges, concluding the conduct was "'indivisible'" from the accompanying sexual intercourse. (*Id.* at p. 340.)

The Supreme Court reversed. The court explained: "Each individual act that meets the requirements of section 288 can result in a 'new and separate' statutory violation." (*Scott, supra,* 9 Cal.4th at pp. 346-347.) The Supreme Court addressed the impact of section 654 where multiple sex acts are committed: "[M]ultiple sex acts committed on a single occasion can result in multiple statutory violations. Such offenses are generally 'divisible' from one another under section 654, and separate punishment is usually allowed. (See, e.g., *People v. Hicks* (1993) 6 Cal.4th 784, 788 & fn. 4; [*People v.*] *Harrison* [(1989)] 48 Cal.3d 321, 335-338; *People v. Perez* (1979) 23 Cal.3d 545, 552-554; *People v. Hicks* (1965) 63 Cal.2d 764, 766.)" (*Id.* at p. 344, fn. 6.)

The court in *People v. Harrison, supra,* 48 Cal.3d 321, established the test to determine whether the course of conduct is indivisible for purposes of applying section 654: "It is the defendant's intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible. [Citations.]" (*Id.* at p. 335.) The *Harrision* court went on to explain that while offenses committed to facilitate a single objective may be punished only once, if a defendant harbored multiple independent criminal objectives, "he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.'" (*Ibid.*, quoting *People v. Beamon* (1973) 8 Cal.3d 625, 639.) It emphasized that in the context of sex crimes, "a 'defendant who attempts to achieve sexual gratification by committing a number of base criminal acts on his victim is substantially more culpable than a defendant who commits only one such act.'" (*Harrison, supra,* 48 Cal.3d at p. 336, quoting *People v. Perez, supra,* 23 Cal.3d at p. 553.) In *Perez,* the Supreme Court held that "[s]ince '[n]one of the sex offenses was committed as a means of committing any other, none facilitated commission of any other, and none was incidental' to any other, section 654 did not apply." (*Harrison, supra,* 48 Cal.3d at p. 336, quoting *People v. Perez, supra,* 23 Cal.3d at pp. 553-554.)

J. testified that appellant committed lewd acts against him repeatedly over the summer. As respondent argues, therefore, while appellant may have touched J.'s buttocks on the same night he forced the child to orally copulate him, the trial court based the convictions on events that happened on separate occasions. This was sufficient to establish that appellant was convicted of, and punished for, separate offenses which were not incidental to one another. There was no violation of section 654.

IV

Appellant contends, and respondent concedes, that three of the five-year enhancements imposed pursuant to section 667.51 must be reversed because the imposition of multiple terms for this enhancement based on appellant's recidivist status is unauthorized. "[W]hen imposing a *determinate* sentence on a recidivist offender convicted of multiple offenses, a trial court is to impose an enhancement for a prior conviction only once to increase the aggregate term, and not separately to increase the principal or subordinate term imposed for each new offense." (*People v. Williams* (2004) 34 Cal.4th 397, 400, citing *People v. Tassell* (1984) 36 Cal.3d 77, 89- 92, overruled on another point in *People v. Ewoldt* (1994) 7 Cal.4th 380, 401.)

In addition, respondent seeks correction of the abstract of judgment because, for count two, it reflects the sentence imposed for count three, which was omitted from the abstract of judgment. On count two, the trial court sentenced appellant to a term of life in prison with a minimum parole eligibility of 15 years (§ 667.61, subd. (b)). On count three, the trial court sentenced appellant to one-third the midterm of six years (for two years) to be served consecutively.

DISPOSITION

Three of the enhancements imposed by the trial court under section 667.51 are reversed, and as modified, the judgment of conviction is affirmed. The case is remanded to the trial court to correct the abstract of judgment to reflect the single enhancement imposed on the aggregate term under section 667.51 and to reflect the actual sentences imposed by the trial court on counts two and three.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

EPSTEIN, P.J.

We concur:

WILLHITE, J.

MANELLA, J.